89-1055

Docket No.

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IN THE

Supreme Court of the United States

October Term, 1989

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

RONALD W. LATHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do Article III, Section 2 and Article I, Section 8 of the United States Constitution (extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction) preclude a state workers' compensation tribunal from asserting jurisdiction over an injury sustained by an employee repairing a completed vessel lying in navigable waters of the United States?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Norfolk Shipbuilding & Drydock Corporation,[1] and the Respondent, Ronald W. Lathey.

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[1] Pursuant to Sup. Ct. R. 28.1, Petitioner, Norfolk Shipbuilding & Drydock Corporation, states that *The Flagship Group, Ltd.* and *Ciserve Norfolk, Inc.* are affiliates thereof. Both are corporations registered in the Commonwealth of Virginia and whose stock is partially owned by the Petitioner.

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Virginia Court of Appeals:

Norfolk Shipbuilding & Drydock Corporation v. Lathey, 8 Va. App. 306 (1989).

Virginia Supreme Court:

Norfolk Shipbuilding & Drydock Corporation v. Lathey, No. 890804 (September 12, 1989).

JURISDICTIONAL STATEMENT

I. The Petitioner herein seeks to review the opinion of the Virginia Court of Appeals affirming the prior decision of the Industrial Commission of Virginia. The date of the judgment sought to be reviewed is *June 6, 1989.*

II. The Supreme Court of Virginia denied Petitioner's Petition for Appeal on *September 12, 1989.*

III. The statutory provision believed by Petitioner to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN DECISION

Article III, §2, cl. 1 of the United States Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between citizens of different States, - between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article I, §8, cl. 18 of the United States Constitution confers upon the Congress of the United States the following powers:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

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IN THE

Supreme Court of the United States

October Term, 1989

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

RONALD W. LATHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On April 29, 1986, Ronald W. Lathey, an employee of Petitioner, Norfolk Shipbuilding & Drydock Corporation ("Norshipco"), sustained an injury to his shoulder when he fell approximately six feet while repairing insulation on overheard pipes on the vessel

U.S.S. MERRIMACK. At the time of the accident, the MERRIMACK was tied to pier 4 at Norshipco and was floating in the Elizabeth River, a navigable waterway of the United States. The MERRIMACK is a completed vessel and was in Norshipco's yard for regularly scheduled repairs. Mr. Lathey was engaged in performing repairs to the vessel at the time of his injury.

On May 6, 1986, Lathey filed a claim under the Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. §§901 *et seq.* (1980), for worker's compensation benefits. The claim under the LHWCA was accepted by Norshipco and Lathey was paid temporary total disability for six days between May 6, 1986 and May 11, 1986. Lathey subsequently received a 15% permanent partial disability rating to the right upper extremity and sought payment of the rating under both the LHWCA and Virginia Workers Compensation Act. Va. Code §§65.1-1 *et seq.* (1987). Norshipco declined to pay the rating under the LHWCA pursuant to applicable case law which indicated that injuries to the shoulder are not paid as a scheduled disability under the federal act.[2]

A hearing was held on the *state* claim before a Deputy Commissioner of the Industrial Commission of Virginia, the tribunal charged with adjudicating claims brought under that act. The sole defense raised by the Petitioner at the hearing was whether Article III, §2 and Article I, §8 of the United States Constitution prohibits the Industrial Commission from asserting jurisdiction over the claim because, at the time of the injury, the claimant was engaged in performing repair work on a completed vessel over navigable waters of the United States:

> *DEPUTY COMMISSIONER MACBETH:*
>
> This case is before the Commission upon the claimant's application which was filed with the Commission on October 16, 1987, by letter of his counsel, John H. Klein, and was referred to the docket for hearing

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[2] Under the LHWCA, the "shoulder" is not considered part of the "arm" and, thus, is not ratable for purposes of a scheduled disability under that Act. *See, Grimes v. Exxon Co.*, 14 B.R.B.S. 573 (1981).

on December 29, 1987 alleging an injury by accident which arose out of and in the course of claimant's employment on April 29, 1986. The letter suggests that the claimant is entitled to compensation for a permanent partial disability of 15%.

Mr. Bilisoly, for the record, would you state the employer's defense to the claimant's application.

MR. BILISOLY:

Yes, sir. The employer's position is that the Commission does not have jurisdiction over the claim on the grounds that the injury occurred, or at the time of the claimant's injury the claimant was engaged in performing repair work on a completed vessel while out, while over navigable waters of the United States of America. And on that basis the United States Supreme Court has held that the State Compensation Act may not constitutionally apply. Our defense is the United States Constitutional Defense.

(Transcript of hearing held on February 8, 1988, App. pp. 11a-12a).

The Deputy Commissioner, and subsequently the full Industrial Commission and the Virginia Court of Appeals, disagreed and awarded benefits. At each appeal level, the only issue briefed, argued and decided was the constitutionality of the Industrial Commission's assertion of jurisdiction.

ARGUMENT

It is respectfully suggested that the Writ of Certiorari in this matter should be granted for the following reasons:

1. In deciding that the Virginia Industrial Commission can assert jurisdiction over a claim by an employee injured while performing repair work on a completed vessel over navigable waters, the Virginia Court of Appeals has decided a federal question in direct conflict with a series of decisions by this Court culminating in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930).

2. The Virginia Industrial Commission's assertion of jurisdiction over Respondent's claim for workers' compensation benefits constitutes an unconstitutional usurpation of power by a state tribunal over a matter expressly reserved by the Constitution to the courts of the United States.

I. ***The Constitution, as Interpreted by This Court, Prohibits a State Workers' Compensation Law From Applying to Maritime Claims for Personal Injuries.***

The Virginia Court of Appeals Below: "We conclude, therefore, that the United States Constitution does not prevent the Virginia Workers' Compensation Act from applying to" an employee injured while performing repair work on a completed vessel in navigable waters of the United States. *Norfolk Shipbuilding and Drydock Corporation v. Lathey,* 8 Va. App. 306, 309 (1989), App. p. 4a.

The Supreme Court of the United States: "Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce as has been often pointed out by this Court. The judgment of the [state] Court below [allowing application of a state compensation law] must be reversed . . ." *John Baizley Iron Works v. Span,* 281 U.S. 222, 232 (1930).

The Supreme Court of the United States: This Court has "made clear that state compensation statutes could not, constitutionally, be applied to injuries to employees engaged in repair work on completed vessels on navigable waters." *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 116 (1962).

The Supreme Court of the United States: "At the farthest extreme, Jensen commanded that nonlocal maritime injuries fall under the LHWCA." *Sun Ship Inc. v. Commonwealth of Pennsylvania,* 447 U.S. 715, 719 (1980).

It is respectfully submitted that the Court of Appeals below, in accepting jurisdiction over a claim for workers' compensation benefits in the face of direct contrary authority from this Court, unconstitutionally extended its power to an area expressly reserved to the courts of the United States. In the words of the Court of Appeals, "[T]he employee injured his right shoulder while repairing a completed vessel on the Elizabeth River at a pier in Norfolk, Virginia." App. p. 3a. With that finding, the Virginia Court was obliged to follow over seventy years of Supreme Court precedent. If the Virginia Court had complied with its obligation

it would have declined jurisdiction. It is suggested that such disregard of this Court's decisions constitutes an error of constitutional proportions.

A. The Matter Herein is a Case of Significant Importance.

This matter presents a case brought by a large shipbuilding company, the vast majority of whose employees are covered under the LHWCA. The question presented by Norshipco may be succinctly stated: *whether a state workers' compensation act can constitutionally apply to an employee injured while performing repair work on a completed vessel while in navigable waters.* The issue is of particular importance to maritime employers in Virginia and elsewhere as an affirmative answer to the question will result in dual jurisdiction of the LHWCA and state acts over all maritime injuries. All claims would have to be administered by two agencies; the United States Department of Labor and the Industrial Commission, each of which have specific, and often conflicting, administrative requirements. The administrative burden to the employers would be substantial, the benefits to the claimants, minimal.

The issue is also of particular legal importance as the identical question has been decided in the negative on four different occasions by the United States Supreme Court, most definitively in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930).[3] This matter was intended to test the continuing viability of those cases as the facts are precisely those which were before this Court in *Span*. In affirming the assertion of jurisdiction over the claim by the Industrial Commission, the Court of Appeals' decision is in direct conflict with this Court and the Constitution; a state of affairs which, it is submitted, requires review.

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[3] *See also, Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923); *Gonsalves v. Morse Drydock & Repair Co.*, 266 U.S. 171 (1924); *Robins Drydock and Repair Co. v. Dahl*, 266 U.S. 449 (1925). These cases are reviewed in detail, *infra*.

B. Southern Pacific Co. v. Jensen.

The evolution of the laws of compensation for workers injured in maritime precincts necessarily begins with this Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). There, the widow of an employee killed while unloading a vessel berthed on the North River in New York City brought claim under the New York Compensation Laws. The employer appealed an award of benefits claiming that Article III, §2 and Article I, §8 of the United States Constitution, extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," prohibited the exercise of jurisdiction by a state tribunal over such maritime personal injuries.

This Court agreed and reversed the award. The existence of a general maritime law was recognized which, "as accepted by the Federal courts, constitutes part of our national law," and over which state statutes had no constitutional affect. *Jensen*, 244 U.S. at 214-15. The Court found that:

> [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Id. at 216. Although the Court noted that it would be "difficult, if not impossible," to define exactly how far state statutes could modify the general maritime law,[4] there was no question that state compensation statutes were "of a character wholly unknown to the common law" and incapable of being enforced in cases of admiralty and maritime jurisdiction. *Id.* at 218.

Finally, the Court noted the nature of the employment in

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[4] It was noted that state statutes had been allowed to confer a lien upon a vessel for repairs, fix pilotage fees and establish the right to recovery in death cases. *Jensen*, 244 U.S. at 216.

refusing to allow the New York Compensation Laws to assert jurisdiction:

> The work of a stevedore, in which the deceased was engaging, is maritime in nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the maritime jurisdiction.

Id. at 217.[5]

The rationale of *Jensen* clearly rested on constitutional grounds: state compensation laws could not apply to maritime injuries because the Constitution itself, not just a federal statute, prohibited it. After the *Jensen* decision Congress twice attempted to amend the Judiciary Act of 1789[6] to allow state compensation laws to operate in the maritime sphere, but this Court invalidated each attempt,[7] thereby urging Congress to pass its own legislation.[8]

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[5] *See also Clyde Steamship Co. v. Walker*, 244 U.S. 255 (1917). Decided the same day as *Jensen*, the New York Compensation Laws were held inapplicable to a longshoreman injured on board a vessel tied to a pier while hooking a rope from a crane onto a load of lumber. The Court in *Walker* held that *Jensen*, "disposed of the fundamental question here involved. The legistlature exceeded its authority in attempting to extend the statue to conditions like those which the record discloses." *Id.* at 257.

[6] 1 Stat. 76-77 (1789), *codified at* 28 U.S.C. §1333 (1976).

[7] Congress first amended the statute, Act of 1917, 40 Stat. 395 (1917), so as to preserve "to claimants the rights and remedies under the workmen's compensation laws of any state." The Supreme Court struck down the amendment as an unconstitutional attempt to delegate federal power to the states. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). The second amendment, Act of 1922, 42 Stat. 634 (1922), attempted to preserve the same remedies, excluding the master or member of the crew of any vessel, and was similarly declared unconstitutional. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

[8] "This power [to revise maritime law by statute], we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees." *Id.* at 227.

Finally, in 1927, Congress passed what was then known as the Longshoremen's and Harbor Workers' Compensation Act,[9] patterned almost identically after the New York statute then in force.[10]

The issue of whether a ship repairer injured over navigable waters could be covered by a state compensation act was first considered by this Court in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923). Claimant, a boilermaker, was killed after falling off a scaffold resting upon a float alongside a vessel to which he was making repairs. This Court held that the New York Workers' Compensation Laws could not apply because, "[n]ot only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce." *Kierejewski*, 261 U.S. at 481. Accordingly, *Jensen* controlled and the state compensation act would have no jurisdiction.[11]

The issue was again considered in a slightly different setting in *Robins Drydock and Repair Co. v. Dahl*, 266 U.S. 449 (1925). The employee there had been injured when a plank on which he was walking broke causing him to fall into the hold of a vessel upon which he was performing repair work. He subsequently brought suit against his employer in a New York state court for personal injuries in connection with failing to provide a safe place to work under the New York Labor Laws. An instruction was given utilizing those laws and this Court reversed, noting that the tort was "maritime, suffered by one doing repair work on board a completed vessel [and] not of mere local concern." *Dahl*, 266 U.S. at 457. Thus, the rights and liabilities of the parties were grounded on maritime law and no state statute could enlarge or impair those

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[9] Ch. 509, 44 Stat. 1424 (1927) (33 U.S.C. §§901-951).

[10] N.Y. Work. Comp. Law §29.2 (McKinney 1922).

[11] *See also, Gonsalves v. Morse Drydock and Repair Co.*, 266 U.S. 171 (1924). The claimant there was engaged in repairing the shell plates of a steamer resting in a floating dock in navigating waters. *Kierejewski* was held to be controlling since the repairs were being made "upon the ship while supported by a structure floating on navigable waters." *Id.* at 172.

rights as "they would not have been different if the accident had occurred at San Francisco." *Id.*

Five years later, a case apparently identical in every way to the instant matter came before this Court. In *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930), the employee was injured while performing repairs to a completed vessel tied to a dock over navigable waters. The Supreme Court of Pennsylvania affirmed an award of compensation on the grounds that the employment had no direct relation to navigation or commerce. On appeal this Court succinctly stated the relevant facts: "She was a completed vessel, lying in navigable waters; the employer, Iron Works, was engaged in making repairs upon her." *Span*, 281 U.S. at 230. Citing *Kierejewski* and *Dahl*, the Court stated the law in language directly applicable here:

> Repairing a completed ship lying in navigable waters has direct and intimate connection with the navigation and commerce as has been often pointed out by this court.

Id. at 232. The award of compensation was reversed as being without a jurisdictional basis.

Thus, the series of post-*Jensen* cases clearly established certain parameters, particularly that employees engaged in performing repair work on completed vessels over navigable waters fell squarely on the seaward side of the line. This state of the law was reaffirmed by the Court in its 1962 decision in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962):

> Before the Longshoremen's Act was passed, this Court had sustained the validity of a state workmen's compensation statute as applied to injuries suffered by an employee engaged in the construction of a launched vessel under construction on navigable waters . . . ***but had made clear that state compensation statutes could not, constitutionally be applied to injuries to employees engaged in***

> repair work on completed vessels on navigable waters.

Calbeck, 370 U.S. at 116. (emphasis supplied) (footnote omitted).[12]

C. The "Twilight Zone."

In 1942 the Court, apparently weary of adjudicating each case on its facts, announced what it called the "twilight zone." *Davis v. Department of Labor*, 317 U.S. 249 (1942). The decedent in *Davis* was employed to assist in the dismantling of an abandoned draw bridge which spanned the Snohomish River in the State of Washington and fell or was knocked into the river and drowned. His widow filed for benefits under the State of Washington's compensation law and the Washington Supreme Court held that any award would be unconstitutional under the *Jensen* doctrine. The Supreme Court reviewed the matter and reversed.

The Court initially declined to "review and reconsider the constitutional implications of the *Jensen* line of decisions" since "such action might bring about still worse confusion." *Davis*, 317 U.S. at 255. It did review the previous cases falling on both sides of the line and found the same to be "undefined and undefinable with exact precision [because] marginal employment may, by reason of particular facts, fall on either side." *Id.* at 255-56. While "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' clearly fell on the seaward side of the line and would be covered under the then existing LHWCA, other employees, such as the decedent, "occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." *Id.* at 253.

Thus, there was a "twilight zone" that included that "marginal employment" to which a state compensation act could constitionally be applied. Accordingly, those cases falling within the "twilight zone" could be brought under either the LHWCA or a state act and presumptive weight would be given to jurisdictional findings made by either administrative agency. *Id.* at 256-57.

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[12] Citing *Kierejewski*, *Gonsalves*, *Dahl* and *Span*, supra.

The *Davis* decision was clearly intended to relieve the lower federal and state courts from the task of reviewing each and every questionable case in jurisdictional terms. The Court was aware that claimants injured while engaged in that "marginal employment" found themselves having to make a rather uneducated guess as to the jurisdictional requirements prior to filing. However, it is also clear that *Davis* did not intend, nor did it purport, to overrule *Jensen*. The Court noted that state and federal agencies had made "real progress" towards clearing the confusion generated by *Jensen*, but that a margin of unpredictability remained and "[o]verruling the Jensen Case would not solve this problem." Id. at 255-56. As was indicated by the Court's subsequent statements in *Calbeck*, employees engaged in repair work to completed vessels over navigable waters were not within the "twilight zone" and remained on the seaward side where state compensation statutes could not constitutionally apply.

D. ***The 1972 Amendments to the LHWCA.***

As this Court detailed in its 1980 decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), after *Davis* and prior to 1972, marine related injuries fell within three jurisdictional spheres as they moved landward. At the furthest extreme, *Jensen* commanded that non- local maritime injuries fall under the LHWCA.

> "Maritime but local" injuries "upon the navigable waters of the United States," ... should be compensated under the LHWCA or under state law. And injuries suffered beyond navigable waters-albeit within the range of federal admiralty jurisdiction - were remediable only under state law.

Sun Ship, 477 U.S. at 719.

In 1972, however, Congress extended the LHWCA landward into the third jurisdictional sphere which had previously been the exclusive province of state compensation law. This Court in *Sun Ship* concluded that: "[T]he 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. Given

that the pre-1972 Longshoreman's Act ran concurrently with state remedies in the 'maritime but local' zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well." *Id.* at 720. Accordingly, employees injured *on land* but within the ambit of the 1972 extension of the LHWCA could claim under either that Act or state compensation laws.

This Court's holding in *Sun Ship* is as important for what it did not hold as for what it did. The Court *did* hold that the 1972 amendments to the LHWCA were intended to extend federal admiralty jurisdiction to injuries suffered beyond navigable waters; as the Court noted, prior to 1972 those injuries had been remediable exclusively under state law. The Court found that the state and federal remedies landward of the water's edge were not mutually exclusive, but rather supplemented one another.

However, while the *Sun Ship* decision resulted in a *landward* extension of the LHWCA it did not result in a *seaward* extension of state law. The Virginia Court of Appeals below seemingly recognized this distinction by acknowledging that non-local maritime injuries are not subject to jurisdiction under a state statute:

> The *Jensen* doctrine has not been overruled. *See Davis*, 317 U.S. at 256. There is still a jurisdictional sphere involving non local maritime injuries to which a state compensation act does not apply.

App. p. 4a.

That same court found, however, that the Respondent was injured in a local, maritime industrial accident, effectively placing the case in the "twilight zone." The finding was based on the undisputed evidence that the Respondent "was employed by the employer as an insulator and was repairing insulation on board a vessel moored at the employer's facility in Norfolk, Virginia." App. p. 4a. The facts above place this case squarely within this Court's decision in *Span* and on the seaward side of the line where "state compensation statutes could not, constitutionally be applied." *Calbeck*, 370 U.S. at 116.

Unlike *Sun Ship*, the issue here is not one of preemption, but one of constitutional jurisdiction of a state compensation law. The

LHWCA does not preempt state law in this sphere as state law cannot apply in the first instance. This Court in *Jensen* and *Span* commanded that the states may not assert jurisdiction over such injuries and it is only this Court, and not a state Court of Appeals, which can say otherwise.

Accordingly, unless this Honorable Court is prepared to declare the *Jensen* commandment extinguished, despite its reaffirmation in *Calbeck* and *Sun Ship*, and to declare the *Span* decision overruled, the claimant's injury here must be found to be maritime in nature and covered exclusively under the LHWCA. It is uncontroverted that, at the time of his injury, the claimant was engaged in repair work on a completed vessel lying in navigable waters. The United States Supreme Court and the United States Constitution prohibit a state from asserting jurisdiction in such circumstances. Therefore, the Virginia Court of Appeals decision which is in direct conflict with this Constitutional principle should be reviewed and reversed.

CONCLUSION

It is respectfully submitted that the decision of the Virginia Court of Appeals below is in direct conflict with decisions of this Court interpreting the Constitution. Accordingly, this Court should grant the Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX

VIRGINIA: IN THE SUPREME COURT

Norfolk Shipbuilding & Drydock Corporation,

Appellant,

v.

Ronald Lathey,

Appellee.

From the Court of Appeals of Virginia

Record No. 890804
Court of Appeals No. 0847-88-1

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

September 12, 1989

COURT OF APPEALS OF VIRGINIA

NORFOLK SHIPBUILDING & DRYDOCK CORP.

v.

RONALD W. LATHEY

Record No. 0847-88-1

OPINION BY JUDGE

BERNARD G. BARROW

June 6, 1989

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

In this appeal from the Industrial Commission the employer contends that the constitutional grant of admiralty and maritime jurisdiction to the federal government bars the application of the Virginia Workers' Compensation Act to an employee injured while repairing a *completed* vessel on navigable waters. However, the holding in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which supports the employer's argument, has been modified. Our own Supreme Court has recognized this modification and has rejected the same contention the employer asserts. *American Original Foods, Inc. v. Ford*, 221 Va. 557, 561, 272 S.E.2d 187, 190 (1980). Therefore, we affirm the Industrial Commission's decision to apply the Virginia Workers' Compensation Act in this case.

The employee injured his right shoulder while repairing a completed vessel on the Elizabeth River at a pier in Norfolk, Virginia. He filed a claim under the Longshoremen's and Harbor Workers' Compensation Act and received temporary total disability benefits. He was later diagnosed as having a fifteen percent permanent partial disability as a result of the injury. Since shoulder injuries are not compensable under the Longshoremen's and Harbor Workers' Compensation Act, he applied for and was awarded benefits for his permanent disability under the Virginia Workers' Compensation Act.

The employer contends that by extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" the United States Constitution prohibits the application of a state workers' compensation law to an employee injured while repairing a completed vessel on navigable waters. This argument relies upon *Jensen* which held that the family of an employee who was killed while unloading a vessel owned by his employer and berthed on navigable waters was not entitled to benefits under New York's Workers' Compensation Act. 244 U.S. at 217-18. Although recognizing that it is "difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," the Court concluded that the work of a stevedore is maritime in nature, within the admiralty jurisdiction, and, therefore, the New York workers' compensation scheme could not apply. *Id.* 244 U.S. at 216. In reaching this decision, the Court followed the applicable interstate commerce rule that "[w]here the subject is national in its character, and ... requires uniformity of regulation, affecting alike all the States ... Congress can alone act." *Id.* at 217.

Many changes have occurred in this field since the *Jensen* opinion, both through the adoption of federal legislation and decisions by the United States Supreme Court. *See, e.g.,* 33 U.S.C. †901-950 (Longshoremen's and Harbor Workers' Compensation Act); *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980); *Calbeck v. Travelers Ins. Co.,* 370 U.S. 114 (1962); *Davis v. Department of Labor,* 317 U.S. 249 (1942). The significance of the intervening history since the *Jensen* opinion has been well described by our Supreme Court. *See Ford,* 221 Va. 557, 558-61, 272 S.E.2d 187, 188-90 (1980).

As a result of this evolution of the law regarding compensation for maritime workers there is now a "regime of concurrent jurisdiction" in which both federal and state compensation schemes may exist. *Sun Ship, Inc.,* 447 U.S. at 718. There is now

a recognized "twilight zone in which ... employees must have their rights determined case by case." *Davis*, 317 U.S. at 256.

The Jensen doctrine has not been overruled. *See Davis*, 317 U.S. at 256. There is still a jurisdictional sphere involving non-local maritime injuries to which a state compensation act does not apply. *Ford*, 221 Va. at 560, 272 S.E.2d at 189. However, the *Jensen* doctrine has been significantly limited. *Sun Ship, Inc.*, 447 U.S. at 417.

In *Ford*, the Virginia Supreme Court upheld the application of the Virginia Workers' Compensation Act to a welder who died as a result of an industrial accident which occurred while he was welding in the clam hold of a ship moored to his employer's dock at Cape Charles, Virginia. It concluded that a 1972 extension of the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act supplemented, rather than supplanted, Virginia law. 221 Va. at 561, 272 S.E.2d at 190. It also concluded that "both the federal and the state governments are constitutionally competent to provide workmens' compensation remedies to workmen who are killed or injured on navigable waters in Virginia. *Id.*

Thus, even though *Jensen* has not been expressly overruled, the law now recognizes the authority of a state to apply its workers' compensation law to a local maritime industrial accident. The parties do not dispute that this worker was employed by the employer as an insulator and was repairing insulation on board a vessel moored at the employer's facility in Norfolk, Virginia; thus, the employee was injured in a local, maritime industrial accident. We conclude, therefore, that the United States Constitution does not prevent the Virginia Workers' Compensation Act from applying to this accident, and the award of the commission is affirmed.
Affirmed.

VIRGINIA: IN THE INDUSTRIAL COMMISSION

RONALD W. LATHEY,

Claimant

v.

NORFOLK SHIPBUILDING, & DRYDOCK CORP.

Employer

Claim No. 131-48-09

Decided on June 10, 1988

REVIEW before the Full Commission at Richmond, Virginia on May 4, 1988.

This case comes at the request of the employer for Review of the Deputy Commissioner's February 19, 1988 Opinion finding that the claimant is entitled to an award for fifteen percent (15%) permanent loss of use of the right arm.

The parties have stipulated that on April 29, 1986 the claimant suffered a fractured scapular when he fell six feet while repairing insulation on overhead pipes on the vessel U.S.S. Merrimack which was floating in the Elizabeth River and tied to pier 4 at Norfolk Shipbuilding & Drydock Corp. Pursuant to the Longshoreman & Harbor Workers' Compensation Act, the claimant was paid workers' compensation benefits for the period May 6, 1986 through May 11, 1986. By letter of September 14, 1987, Dr. Robert Neff, the

treating physician, stated that the claimant had a fifteen percent (15%) permanent partial disability to the right upper extremity as a result of the injury to his shoulder. Additional benefits for this rating under the Federal Longshoreman and Harbor Workers' Act have not been paid because the injury is not to a part of the body specifically listed in that Act and there is no evidence that the claimant has lost any wage-earning capacity.

The sole issue in this case is whether the claimant's exclusive remedy and right of recovery is under the Longshoreman & Harbor Workers' Compensation Act because at the time of the injury, he was engaged in performing repair work over navigable waters of the United States on a completed vessel. The Commission on Review finds that concurrent jurisdiction exists between Virginia and the Federal Compensation Act. In reaching this decision, the Commission relies on the case of *Nettie Ford v. American Original Foods, Inc.*, 221 Va. 547, 272 S.E.2d 187, (1980) in which the Court held that even though a party is entitled to benefits under the Federal Longshoreman & Harbor Workers' Compensation Act, Virginia also has jurisdiction over workers' compensation claims which arise out of accidents occurring in Virginia upon navigational waters of the United States. The Court also noted that even though concurrent jurisdiction exists, a claimant will not be entitled to a double recovery. The Commission notes that the Ford Case involved work on a completed vessel and was decided after *Sun Ship, Inc. v. Commonwealth of Pennsylvania* 447 U.S. 715 (1980). The Commission finds that concurrent jurisdiction exists and inasmuch as the claimant is not entitled to an award for permanent-partial incapacity under the Federal Longshoreman and Harbor Workers' Compensation Act, an award under §65.1-56.(13) of the Code of Virginia would not be a double recovery since such benefit is available to the claimant only under the State Act. In reaching this conclusion, the Commission notes the decision in *Robinson v. Norfolk Shipbuilding & Drydock Corporation* 66 OIC 7 (1987) in which a claimant who was severely burned while working on a ship docked in navigable Virginia waters was awarded the State benefits under §65.1-56 (19) Code of Virginia on the basis that concurrent jurisdiction existed. Since the Federal Act did not provide for compensation benefits for disfigurement under the circumstances of the case, there is no double recovery. For the reasons stated, the Opinion of the Deputy Commissioner is AFFIRMED.

Interest shall be paid on the award in accordance with §65.1-98.1 of the Code of Virginia.

From the compensation due a total fee of $1200.00 shall be deducted and paid directly to Attorney John H. Klein for legal services rendered the claimant.

This case is ordered removed from the Review Docket.

VIRGINIA: IN THE INDUSTRIAL COMMISSION

RONALD W. LATHEY,

Claimant

v.

NORFOLK SHIPBUILDING & DRY DOCK CORPORATION,

Employer

Claim No. 131-48-09

Opinion by MACBETH,

Deputy Commissioner

Decided on February 19, 1988

Hearing before Deputy Commissioner MACBETH at Norfolk, Virginia, on February 9, 1988.

This case is before the Commission upon the application of Ronald W. Lathey, by letter of his counsel, John H. Klein, Esquire, filed October 16, 1987, and referred on December 29, 1987 to the hearing docket, seeking a determination of claimant's entitlement to compensation under the Virginia Workers' Compensation Act for an alleged permanent fifteen percent loss of use of his right upper extremity as a result of accidental injuries which arose out of and in the course of his employment with Norfolk Shipbuilding & Dry Dock Corporation on April 29, 1986.

The employer, by counsel, concedes claimant sustained a right shoulder injury by accident which arose out of and in the course of his employment on April 29, 1986, but defends claimant's

application on the grounds that the Commission lacks jurisdiction over claimant's application because at the time of his accidental injury, he was engaged in performing repair work on a completed vessel while over navigable waters of the United States and thus claimant's exclusive remedy and right of recovery for this injury are governed by the laws of the United States by preemption of the United States Constitution.

It is uncontroverted that Ronald W. Lathey sustained an injury (fractured scapula) by accident which arose out of and in the course of his employment as an Insulator, First Class, with Norfolk Shipbuilding & Dry Dock Corporation on April 29, 1986. This injury was sustained while the claimant was repairing insulation on overhead pipes on board the vessel U.S.S. Merrimack, which was moored at Pier 4 at the employer's facility in the Berkley section of the City of Norfolk. Claimant's average weekly wage at the time of the injury was $613.95.

It is uncontroverted that the claimant was paid compensation for six-sevenths week of work incapacity under the Federal Longshoremen & Harbor Workers Compensation Act as a result of this accidental injury at the weekly rate of $409.30, beginning May 6, 1986 and continuing through May 11, 1986.

It is further uncontroverted that the claimant's treating physician, Dr. Robert Neff, rated the claimant as having a permanent fifteen percent permanent partial disability to the right upper extremity as a result of the April 29, 1986 shoulder injury and that claimant had not received, and was not eligible for compensation for this permanent partial disability under the Federal Longshoremen & Harbor Workers Act because claimant suffered no economic disability as a result of the rated permanent incapacity.

In *Nettie Ford v. American Original Foods, Inc.*, 221 Va. 547, 272 S.E.2d 187 (1980), the Court recognized that the Industrial Commission of Virginia has jurisdiction over a workers' compensation claim that arose out of an accident which occurred in Virginia upon navigable waters of the United States, even though the same claim entitles a party to benefits under the Federal Longshoremen & Harbor Workers Compensation Act. However, the Court also recognized the well established principle that Virginia will not permit a double recovery to occur even though this concurrent jurisdiction exists.

It is uncontroverted that the work situs of claimant's April

29, 1986 accidental injury was a vessel docked at a pier and secured by lines to that pier in the City of Norfolk. We hold that claimant's work situs was thus in the Commonwealth of Virginia when the accidental injury occurred.

In this case, we find the claimant is entitled to an award for permanent partial incapacity, pursuant to Virginia Code § 65.1-56[13], for permanent partial incapacity under the Virginia Workers' Compensation statute because this is a benefit available to him under State law which is not available under the Federal Longshoremen & Harbor Workers Compensation Act. The claimant would not receive a double recovery since the record establishes he is barred from making any recovery for the rated permanent partial disability to his right upper extremity under the Federal statute for his April 29, 1986 accidental injury.

The Commission's holding in this case is in accord with our prior decision of March 13, 1987, in the case of *Robinson v. Norfolk Shipbuilding & Dry Dock Corporation*, I. C. Claim Number 126-48-26.

The Commission will not award any medical benefits or compensation benefits to the claimant because such benefits are available under the Longshoremens & Harbor Workers Compensation Act.

An appropriate award sustaining the claimant's application shall be entered.

AWARD

An award is hereby made in favor of Ronald W. Lathey against the Norfolk Shipbuilding & Dry Dock Corporation providing for payment of compensation at the weekly rate of $311.00 beginning September 14, 1987 and continuing thereafter for thirty weeks on account of a permanent fifteen percent loss of use of the right arm, attributable to the the [sic] April 29, 1986 accidental injury. Accrued compensation under this award shall be remitted to claimant in a lump sum, after deducting therefrom the amount of $750.00 which shall be remitted to John H. Klein, Esquire, for legal services rendered the claimant.

This case is ordered removed from the hearing docket.

VIRGINIA: IN THE INDUSTRIAL COMMISSION

RONALD W. LATHEY,

Claimant

v.

NORFOLK SHIPBUILDING & DRY DOCK CORPORATION,

Employer

Claim No. 131-48-09

TRANSCRIPT

Hearing before Deputy Commissioner MACBETH at Norfolk Virginia, on February 9, 1988.

All witnesses having been duly sworn, the following testimony was taken.

DEPUTY COMMISSIONER MACBETH:

This case is before the Commission upon the claimant's application which was filed with the Commission on October 16, 1987, by letter of his counsel, John H. Klein, and was referred to the docket for hearing on December 29, 1987 alleging an injury by accident which arose out of and in the course of claimant's employment on April 29, 1986. The letter suggests that the claimant is entitled to compensation for a permanent partial disability of 15%.

Mr. Bilisoly, for the record, would you state the employer's defense to the claimant's application.

MR. BILISOLY:

Yes, sir. The employer's position is that the Commission does not have jurisdiction over the claim on the grounds that the injury occurred, or at the time of the claimant's injury the claimant was engaged in performing repair work on a completed vessel while out, while over navigable waters of the United States of America. And on that basis the United States Supreme Court has held that the State Compensation Act may not constitutionally apply. Our defense is the United States Constitutional Defense.

DEPUTY COMMISIONER MACBETH:

I take it that your position is that the boat at the time that his injury occurred, was floating?

MR. BILISOLY:

Yes, it was.

DEPUTY COMMISSIONER MACBETH:

It was not under way?

MR. BILISOLY:

It was not under way. It was tied to Pier 4, I think, at Norfolk Shipbuilding & Dry Dock Corporation. It was undergoing repairs, it was on navigable waters of the United States.

DEPUTY COMMISSIONER MACBETH:

Was it in dry dock?

MR. BILISOLY:

No, it was not.

DEPUTY COMMISSIONER MACBETH:

Okay.

No. 89-1055

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

RONALD W. LATHEY,

Respondent,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a state worker's compensation law apply to an injury sustained during repair of a completed vessel on navigable waters within the state's territorial boundaries?

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IN THE

Supreme Court of the United States

October Term, 1989

RONALD W. LATHEY,

Respondent,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of the case contained on pages 1-3 of the Petitioner's Petition for Writ of Certiorari is accurate.

ARGUMENT

Respondent, Ronald Lathey, the injured employee, respectfully urges this Honorable Court to deny the Petition for a Writ of Certiorari for the following reasons:

1. The line of decisions following *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), on which the petitioner rests its argument, has been narrowed by judicial recognition of a twilight zone in which a regime of concurrent jurisdiction may exist between state and federal worker's compensation laws.

2. This Court has allowed exceptions to the *Jensen* "limitation upon the power of states to interpose where maritime matters are involved" by approving state benefits to a worker injured while engaged in repair of a completed vessel on the navigable waters of the U.S. in *Bethlehem Steel Company v. Moore*, 335 U.S. 874 (1948) (affirming the Massachusetts Court) and in *Baskin v. Industrial Accident Commission*, 338 U.S. 854 (1949) (reversing the California court's denial of benefits), and 340 U.S. 886 (1950).

3. No new legal developments have occurred since this Court's affirmation of the twilight zone concept in *Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942), *Calbeck v. Travelers Insurance Company*, 370 U.S. 114 (1962), and *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980).

I. The Constitution, as Interpreted by This Court, Allows a State Workers' Compensation Law to Apply to Injuries Sustained in the Repair of a Completed Vessel on Navigable Waters within the State's Territorial Boundaries.

As far back as 1942, this Court said: "There is, in light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons . . . who are, as a matter of actual administration, in fact protected under the state compensation act." *Davis v. Department of Labor and Industries* , 317 U.S. 249, 256 (1942).

Then in 1962, this Court stated, "[o]ur conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 117 (1962)(footnote omitted).

In its most recent decision on concurrent jurisdiction, this Court said, "The language of the 1972 amendments [to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq* (1980)], cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in Davis and Calbeck . . . if anything, that change reinforces our previous interpretation of that section as contemplating concurrent jurisdiction." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 720-21 (1980).

Subsequent to the articulation of the twilight zone concept in *Davis*, this Court held that repair on a completed vessel was within that twilight zone in *Bethlehem Steel Company v. Moore*, 335 U.S. 874 (1948) (affirming the Massachusetts court's decision granting state benefits) and *Baskin v. Industrial Accident Commission*, 338 u.S. 854 (1949) (vacating and remanding the California court's denial of benefits for reconsideration in light of *Moore*), and 340 U.S. 886 (1950).

The Virginia Court of Appeals below found that the Respondent injured his shoulder while repairing a completed vessel on the Elizabeth River at a pier in Norfolk, Virginia. This finding

placed the employee inside the judicially established "twilight zone" within which "federal jurisdiction supplements rather that supplants, state compensation law". *Sun Ship, Inc.*, 447 U.S. at 720. Therefore, the state Court of Appeals below correctly affirmed an award of benefits under the Virginia Workers' Compensation Act, Va. Code §§ 65.1-1, *et seq* (1987), by the Industrial Commission of Virginia, the tribunal charged with adjudicating claims brought under the state act.

The Court of Appeals below acted appropriately and within precedent established by this Court. This Court should decline to review a settled question such as the instant matter in the absence of new developments or changed law.

A. THE NARROWING OF *JENSEN*

Relying on *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), the Petitioner contends that the Federal workers' compensation statute is the Respondent's exclusive remedy for injuries sustained on board a completed vessel on the navigable waters of the United States. This contention is based on the premise that states are barred by the United States Constitution from the application of state statutory schemes in maritime arenas. *Jensen* declared, however, that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied." *Jensen*, 244 U.S. at 216 (emphasis added).

Notwithstanding this qualifier, *Jensen* was construed to prohibit the grant of workers' compensation benefits to thousands of employees. *Calbeck, supra*, 370 U.S. at 118. Recognizing the "jurisdictional monstrosity" created by *Jensen*, this Court and Congress began to take immediate steps to rectify the matter. Just ten years after *Jensen*, Congress passed the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq* (1980). The language of the Act ensured compensation in cases of injury to employees on navigable waters to which *Jensen* and

others[1] had made the availability of a state compensation remedy questionable. *Calbeck*, 370 U.S. at 126.

Likewise, this Court has restricted, avoided and limited the application of *Jensen* ever since the decision was announced in 1917. The following cases are illuminating.

In *Western Fuel Company v. Garcia*, 257 U.S. 233 (1921), this Court concluded that the death of a stevedore at work in a hold of a vessel docked in San Francisco was not within the national uniformity requirement. The court upheld the jurisdiction of a Federal district court to entertain a suit in admiralty for damages for the death of the longshoreman under a state wrongful death statute. The Supreme Court reasoned that while the subject was maritime it was "local in character" and that application of the state statute would not work "material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), it was held that an employee of a shipbuilding company at work on a vessel which had been launched so as to be within admiralty jurisdiction could properly receive compensation under the Oregon State Compensation Law.

Millers' Indemnity Underwriters v. Braud, 270 U.S. 59 (1926), concluded that the Texas Workmen's Compensation Act could apply to a diver working for a shipbuilding company, where the diver was working from a floating barge anchored in the navigable waters of Texas. He was engaged in sawing off timbers of an abandoned set of ways formerly used for launching ships, which had become an obstruction to navigation. The Court held his employment to be maritime but local.

In *Alaska Packers Association v. Industrial Accident Commission*, 276 U.S. 467 (1928), an employee was injured trying to push a stranded boat into navigable waters. The boat was to be

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[1]*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) and *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924) declared unconstitutional two attempts by Congress to deal with the *Jensen* mischief by passing legislation allowing state compensation statutes to operate. This Court found that the legislation tended to defeat the purpose of the Constitution to achieve harmony and uniformity in maritime law.

floated to a nearby dock and then removed from the water. The employment was held maritime but local.

Sultan Railway and Timber Company v. Department of Labor and Industries, 277 U.S. 135 (1928) held that taking apart booms of logs which had been floated to a saw mill on navigable waters was maritime employment but local.

Thus, (although *Jensen* has not been specifically overruled), in order to avoid the application of the *Jensen* rule, this Court created the doctrine of "maritime but local" where state workers' compensation statutes may constitutionally apply.

However, as a result of the "maritime but local" doctrine, it was still very difficult to determine which workers were covered by State Acts and which were not. Commentators noted that "only a sooth-sayer with a crystal ball could tell which claimants were on the state side of the line ("maritime but local") and which were on the federal side ("maritime but national")." Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975) at 419-420.

This Court offered some clarification in *Davis, supra*, 317 U.S. 249. *Davis* involved a structural steel worker who drowned when he fell into a river while engaged in dismantling a bridge over navigable waters. In *Davis*, this Court recognized the confusion created by *Jensen*: "The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here." *Id.* at 253. (footnote omitted).[2] In an effort to alleviate some of the confusion, this Court recognized the boundary between state and federal compensation schemes as a "twilight zone" in which there existed

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[2]The footnote omitted cites cases both in support of and against state jurisdiction and gives a reference to lists of other cases on both sides. The index of cases includes *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930), which held that repair of a completed ship lying in navigable waters has a direct and intimate connection to navigation and commerce. *Span* was not a landmark decision; its participating dissenters included Justices Holmes and Brandeis. Although *Span* is quoted in subsequent decisions, it is quoted most often for its ambiguity and for its contribution to the confusion surrounding the federal versus state compensation controversy. *Davis, supra*, 317 U.S. 249. *Moore's Case*, 323 Mass. 462, 80 N.E.2d 478, *aff'd*, 335 U.S. 874 (1948). Significantly, *Span* did not say that a connection between an employee's injury and navigation and commerce precluded a finding of jurisdiction under a state compensation scheme. *Span* clearly does not offer a definitive answer.

essentially concurrent jurisdiction between the two schemes. *Id.* at 256. Within this zone, employee rights are to be determined on a case by case basis. In allowing recovery in *Davis* under a state worker's compensation statute, this Court found surrounding circumstances to be controlling. *Id.* The Court added the following instructive language with respect to the resolution of these kinds of cases.

> "Faced with this factual problem we must give great-indeed, presumptive-weight to the conclusions of the appropriate Federal authorities and to the state statutes themselves. Where there has been a hearing by the Federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy . . . In the instant case we do not enjoy the benefit of Federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there we have relied heavily on the presumption of constitutionality in favor of the state statute." *Id.* at 256-257.

The result of *Davis* is that injured water front employees have the right to recover compensation under either the Longshore Act or the workers' compensation law of the state in which the injury occurs. *Hahn v. Ross Island Sand and Gravel Company*, 358 U.S. 272 (1959). In *Hahn*, an employee working on a barge in navigable waters within a state was found to be within the twilight zone.

In 1962, this Court reiterated its determination that some maritime injuries may be compensated under either state or federal law in *Calbeck*, *supra*, 370 U.S. 114. *Calbeck* made clear that even in circumstances where the federal compensation scheme was the appropriate remedy, a state compensation statute "could validly have been applied." *Id.* at 129.[3]

Sun Ship, *supra*, 447 U.S. 715, is this Court's most recent endorsement of the "twilight zone". There this Court declared "that the 1972 extension of federal jurisdiction [by the amendments to the Longshore Act] supplements rather than supplants, state compensation." *Id.* 447 U.S. at 720. Clearly, then, depending upon circumstances of individual incidents, either compensation scheme may properly apply.

B. THE IDENTICAL QUESTION RAISED HEREIN HAS BEEN PREVIOUSLY DECIDED BY THIS COURT

While the foregoing cases are educative in unfolding the evolution of pertinent case law, no one of those cases alone is completely dispositive of the question raised herein. However, two decisions made by this Court more than forty years ago directly addressed this identical question and thereby render review by this Court unnecessary.

In *Moore*, *supra*, 335 U.S. 874, this Court affirmed the Massachusetts Court's award of state compensation benefits to a shipyard rigger who was injured when he slipped aboard a vessel in a dry dock floating in a navigable river. Similarly, in *Baskin*, *supra*, 338 U.S. 858 and 340 U.S. 886, this Court vacated and remanded the California Court's denial of state workers' compensation benefits to a helper injured while carrying planks from one hold to another, where a skilled joiner was to make the planks a part of the ship in the course of repairs.

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[3]*Calbeck* explained *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953) in which an employee was killed while engaged in repair of a vessel physically located on land but on a marine railway (and thus within the LHWCA requirement in §3(a) of occurrence "upon . . . navigable waters") so that LHWCA applied; however, the Court stated that state compensation could also have applied.

In these decisions, this Court issued a clear directive that repair work on board a completed vessel upon the navigable waters of the United States is within the twilight zone identified in *Davis*, *Calbeck*, and *Sun Ship* and that state compensation may constitutionally be applied.

It is uncontroverted that at the time of his injury, the Respondent was engaged in repair work on a completed vessel upon the navigable waters of the United States. Accordingly, these facts bring the Respondent's claim within the holdings of *Moore* and *Baskin*. Thus, the Virginia Court of Appeals acted within its jurisdictional authority in hearing Respondent's claim under the state compensation scheme and no error was created thereby.

C. AFTER *MOORE* AND *BASKIN*

In 1980, this Court was still concerned with the "jurisdictional monstrosity" created by *Jensen* prior to the clarifying opinions in *Davis* and *Calbeck*. *Sun Ship*, *supra*, 447 U.S. 715. The Court analyzed at length the 1972 amendments to the LHWCA in terms of existing case law and legislative history; the Court could "find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction could exist with state compensation laws." *Id.* at 722. Additionally, the Court did not find in the legislative history any suggestion of a "congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoreman's Act." *Id.* at 721.

It is implicit in the Court's opinion in *Sun Ship* that state schemes may cover maritime injuries of local interest. Thus, even after the 1972 amendments, this Court continued to endorse the "maritime but local" concept within the "twilight zone" theory. *Sun Ship* is still good law.

Since *Moore* and *Baskin*, the specific question raised herein has not been addressed by this Court. Further, those decisions are not altered either by the 1972 amendments to the LHWCA or by *Sun Ship*. Where the Court contemplates supplemental rather than supplanting jurisdictions, as in the circumstances of the instant matter, no question of unconstitutional enlargement of state authority need be raised. Consequently, it is respectfully submitted that *Moore* and *Baskin* should be controlling.

Moreover, even if this Court disagrees with the clear precedents of *Moore* and *Baskin* that the respondent's injuries are within the twilight zone, the injury that is the subject of the question herein is one of local concern. The injury occurred on a river within the state; the Respondent is a local resident; the Petitioner is a local employer. Clearly, the Respondent's injury is "maritime but local". This Court has approved state jurisdiction in such circumstances. Therefore, the Virginia Court of Appeals decision, which is within constitutional parameters, need not be reviewed.

CONCLUSION

The decision of the Virginia Court of Appeals below is in accord with constitutional principles and with decisions of this Court regarding the grant of jurisdiction over injuries within the twilight zone between state and federal compensation schemes. Accordingly, there is no error in this record. This Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for Respondent

89-1055

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

RONALD W. LATHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Norfolk Shipbuilding & Drydock Corporation,[1] and the Respondent, Ronald W. Lathey.

[1] Pursuant to Sup. Ct. R. 28.1, Petitioner, Norfolk Shipbuilding & Drydock Corporation, states that *The Flagship Group, Ltd.* and *Ciserve Norfolk, Inc.* are affiliates thereof. Both are corporations registered in the Commonwealth of Virginia and whose stock is partially owned by the Petitioner.

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ARGUMENT IN REPLY

It is respectfully suggested that this Court either reaffirm its decision in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) or abolish the *Jensen*[2] rule and its many exceptions. The matter is one of *stare decisis*, stability and certainty.

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[2] *Southern Pacific v. Jensen*, 244 U.S. 205 (1917).

I. *Stare Decisis* is the True Issue.

As stated in the Petition for Certiorari and conceded by the Respondent, the instant case is factually indistinguishable from this Court's decision in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930). Both Mr. Span and Mr. Lathey were injured while performing repair work on completed vessels over navigable waters of the United States. This Court in *Span* found that such activities had a direct relation to navigation and commerce and that the state compensation act could not be constitutionally applied. *Id.* at 232. As such, the Court simply followed a long line of decisions on similar facts.[3]

Respondent makes no attempt to distinguish *Span* other than to impune its landmark status.[4] The factual scenario present in *Span* is not within the "twilight zone" and has never been regarded by the Court as a gray area. While this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), acknowledged that the post-*Jensen* decisions produced no sure definition of the area where state laws could constitutionally apply, it acknowledged plainly that "state compensation statutes could not, constitutionally, be applied to injuries to employees engaged in repair work on completed vessels on navigable water." *Id.* at 116 (emphasis supplied).

If this case, factually indistinguishable from *Span* and its predecessors, is allowed to remain in the "twilight zone", then the exceptions have swallowed the *Jensen* rule in *toto*. If this is so, then there are no longer any circumstances in which an injury may be characterized as a strictly maritime injury and *Jensen* itself is in the "twilight zone".

It should be kept in mind that the only reason for the passage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (1980) ("LHWCA")

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[3] See, Petition for Writ of Certiorari, pp. 9-10.

[4] Petitioner agrees that *Span* was not a "landmark" case as it simply followed a direct line of precedent; precisely what Petitioner is requesting herein.

was *Jensen*'s commandment that the Constitution prohibited state compensation laws from applying to maritime injuries. Twice Congress tried to statutorily extend state compensation laws to maritime injuries and twice this Court rebuffed that attempt.[5] Therefore, if Virginia can constitutionally apply its compensation laws to Mr. Lathey's injury, the *Jensen* rule and the theoretically underpinnings for the LHWCA are swept away like the pilings from an ocean-front house. Overrule *Jensen*, if that is the wisdom of the Court, but do not simply allow it to wither away for that will cause unneeded litigation which will further confuse and subvert the confidence in this Court's precedent that *stare decisis* is intended to engender.[6]

It is submitted that the Petition should be granted or, in the alternative, the case reversed *per curiam* on the strength of *Span*.

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[5] See, Petition for Writ of Certiorari, p. 8.

[6] The argument that the Court's refusal to grant the writ of certiorari in this case will result in further litigation and confusion of the issues is underscored by Respondent's reliance upon this Court's *per curiam* decisions in *Bethlehem Steel Co. v. Moore*, 355 U.S. 874 (1948) (*per curiam*) and *Baskin v. Industrial Accident Commission*, 340 U.S. 886 (1950) (*per curiam*).

The underlying decisions in both *Moore* and *Baskin* involved injuries sustained by workmen who performed the majority of their work on shore but were injured while working on a completed vessel undergoing repairs while in navigable water. The lower courts found that such injuries fell within the "twilight zone". *Bethlehem Steel v. Moore*, 323 Mass. 462, 80 N.E.2d 478, 481 (1948), *aff'd per curiam*, 355 U.S. 874 (1948); *Baskin v. Industrial Accident Commission*, 89 Cal. App. 2d 637, 201 P.2d 549, *vacated and remanded*, 388 U.S. 854 (1949) (*per curiam*), 97 Cal. App. 2d 257, 217 P.2d 733, 737-738, (1950), *aff'd per curiam*, 340 U.S. 886 (1950).

As distinguished from *Moore* and *Baskin*, Mr. Lathey performed a majority of his work (over 80%) on board vessels. Mr. Lathey's injury is therefore maritime and non-local and thereby governed exclusively by the LHWCA (See appendix).

CONCLUSION

It is respectfully submitted that the decision of the Virginia Court of Appeals is in direct conflict with decisions of this Court interpreting the Constitution. Accordingly, this Court should grant the Petitioner's Writ of Certiorari or, in the alternative, reverse *per curiam*.

Respectfully Submitted,

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Counsel for Petitioner

N.B. Lest this Court be of the opinion that the issue of concurrent jurisdiction is not one of national importance, please see the very recent decision of the Virginia Supreme Court in *McBride v. Metric Construction, Inc.*, ____ Va. ____, ____ S.E.2d ____, 6 VLR 1092 (unofficial citation) (Record No. 881154, January 12, 1990). In a case where benefits were claimed and paid under the LHWCA and no claim for state benefits was ever filed, that Court held that the exclusivity provisions of the Virginia Workers' Compensation Act nonetheless barred third-party suits against general and subcontractors, irrespective of what was thought to be clear authority for such suits under the LHWCA.

APPENDIX

VIRGINIA: IN THE INDUSTRIAL COMMISSION

RONALD W. LATHEY,

Claimant,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORP.,

Employer.

Claim No. 131-48-09

TRANSCRIPT

Hearing before Deputy Commissioner MACBETH at Norfolk, Virginia, on February 9, 1988.

All witnesses having been duly sworn, the following testimony was taken.

* * * *

DEPUTY COMMISSIONER MACBETH:
Any questions, Mr. Bilisoly?

BY MR. BILISOLY:
Q. That was April 29, 1986, right?
A. Yes, sir.
Q. Alright. Is it, is it Lathey? Am I pronouncing it right?

A. Lathey.

Q. Lathey. Okay. Mr. Lathey, your job at Norfolk Ship in April of 1986 was of an Insulator First Class? Am I correct

A. Yes, sir.

Q. Okay. And would it be fair to say that approximately 80% of your work on a general basis is done on board vessels?

A. 80% or more.

Q. Okay. And that's, what you do with Norfolk Ship, what you're doing is you're doing repair work on vessels that are in Norfolk Ship's Yard?

A. Yes, sir.

Q. Alright. The remainder of the work is, it takes place in the insulated, basically, takes place in the insulation shop fabricating materials which are going to be placed on board a vessel?

A. Yes, sir.

Q. Is that correct? Okay.

MR. BILISOLY:

I don't have any further questions.

DEPUTY COMMISSIONER MACBETH:

Okay. Thank you very much.

(Off the Record)

Witnesses dismissed.
Case concluded.